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No. 07-

IN THE

# Supreme Court of the United States

WALTER ALLEN ROTHGERY,

*Petitioner,*

*v.*

GILLESPIE COUNTY, TEXAS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Sixth Amendment right to counsel attaches when "adversary judicial proceedings have been initiated." *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972). This Court has held that when a defendant is arrested, "arraigned on [an arrest] warrant before a judge," and "committed by the court to confinement," "[t]here can be no doubt . . . that judicial proceedings ha[ve] been initiated." *Brewer* v. *Williams*, 430 U.S. 387, 399 (1977).

In this case, petitioner was arrested and brought before a magistrate judge who informed petitioner of the accusation against him, found probable cause that he had committed the offense based on a police officer's sworn affidavit, and committed him to jail pending trial or the posting of bail. The question presented is whether the Fifth Circuit correctly held—in a decision that conflicts with those of other federal courts of appeals and state courts of last resort—that adversary judicial proceedings nevertheless had not commenced, and petitioner's Sixth Amendment rights had not attached, because no prosecutor was involved in petitioner's arrest or appearance before the magistrate.

## PARTIES TO THE PROCEEDING

The petitioner is Walter Allen Rothgery, the plaintiff and plaintiff-appellant in the courts below. The respondent is Gillespie County, Texas, the defendant and defendant-appellee in the courts below.

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Walter Allen Rothgery respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## INTRODUCTION

As this Court has repeatedly held, "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972)).

In *Brewer*, this Court held that "[t]here can be no doubt . . . that judicial proceedings had been initiated," and the Sixth Amendment right to counsel had attached, when a defendant was arrested, made an initial appearance before a court, and was committed by the court to confinement in jail pending trial. *See* 430 U.S. at 399. Subsequently, in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), the Court reaffirmed that this sequence of events triggers the Sixth Amendment right to counsel. *See id.* at 629-632 & n.3. As *Jackson* explained, it is at that time—when a court has confronted a defendant with the charges against him and imposed restrictions on his liberty—that he "finds himself faced with the prosecutorial forces of organized society," and with the need to "rely on counsel as a 'medium' between him and the State." *Id.* at 631-632 (citations omitted).

Since *Brewer* and *Jackson*, the overwhelming majority of courts of appeals and state courts of last resort to address the question have held that when a defendant is arrested, brought before a judge who informs the defendant of the charges against him, and bound over to jail or released on bond, adversary judicial proceedings have commenced and the Sixth Amendment right to counsel has attached.

In this case, the Court of Appeals for the Fifth Circuit joined a small minority of courts to have held otherwise. According to the Fifth Circuit, a defendant has no right to counsel even after he has been arrested, brought before a court to hear the accusation against him, and bound over to custody or released on bail—the sequence of events that *Brewer* and *Jackson* concluded marked the commencement of judicial proceedings—unless he can demonstrate that a prosecutor is aware of or involved in those events.

The relevant facts are undisputed. Petitioner Walter Allen Rothgery was arrested on suspicion of being a felon in possession of a firearm—when he was not, in fact, a felon. Rothgery was brought before a magistrate who informed him of the accusation against him and committed him to jail pending the posting of bail or the disposition of the charges. Although Rothgery requested counsel, none was appointed

until six months following his initial arrest and appearance before the magistrate, after Rothgery had been indicted, had his bail increased, and had been rearrested and jailed. Once appointed, Rothgery's counsel was able to obtain a reduction of bail, and Rothgery was released after serving approximately three weeks in jail on this second arrest. Rothgery's counsel obtained records proving that Rothgery was not a felon, and the charges were dismissed.

Rothgery then filed suit under 42 U.S.C. § 1983 for damages stemming from the denial of his Sixth Amendment right to counsel. The district court rejected Rothgery's claim, and the Fifth Circuit affirmed, holding that Rothgery's Sixth Amendment right to counsel did not attach until he was indicted. The Fifth Circuit acknowledged that, in *Brewer* and *Jackson*, this Court had held that adversary judicial proceedings commenced prior to indictment—after an initial appearance before a magistrate at which the defendant was committed to confinement—"without mentioning whether prosecutors were involved" in that initial appearance. App. 7a. But it nevertheless held that because "prosecutors were not aware of or involved in Rothgery's arrest or appearance before the magistrate," that appearance did not initiate adversary judicial proceedings, and Rothgery's right to counsel did not attach. *Id.*

In so holding, the Fifth Circuit, alone among federal courts of appeals, created a "prosecutorial involvement" test to determine when the Sixth Amendment right to counsel attaches. Its decision represents a square split of authority with other courts of appeals that have addressed the question. It also conflicts with decisions of state courts of last resort that have expressly rejected a prosecutorial involvement test as a matter of federal constitutional law. And it cannot be reconciled with this Court's holdings in *Brewer* and *Jackson*.

The Fifth Circuit's analysis converts the straightforward test for the initiation of adversary judicial proceedings reflected in this Court's longstanding precedent into an unworkably fact-intensive inquiry into what particular

prosecutors knew and when they knew it. Moreover—because defendants often make an initial appearance before a magistrate and are jailed well before formal indictment—under the Fifth Circuit's rule, defendants in that circuit will potentially face protracted incarceration without access to counsel.

In short, in the Fifth Circuit, defendants who have been committed to jail by a court based on the charges against them will have no Sixth Amendment right to counsel unless they can demonstrate a prosecutor's knowledge of, or involvement in, the court-ordered deprivation of liberty—while defendants in other circuits need make no such showing. This disagreement will persist unless and until this Court intervenes. This Court should grant certiorari to clarify that it meant what it said in *Brewer* and *Jackson* and to resolve the clear split of authority among the lower courts on this important question.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 491 F.3d 293 (5th Cir. 2007) (App. 1a-12a). The opinion of the United States District Court for the Western District of Texas is reported at 413 F. Supp. 2d 806 (W.D. Tex. 2006) (App. 13a-31a).

## JURISDICTION

The Court of Appeals entered its judgment on June 29, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI. The Sixth Amendment is applicable to the states through the Fourteenth Amendment.

## STATEMENT OF THE CASE

1. *Legal Background.*—This Court has long recognized that the right to appointed counsel is a cornerstone of our criminal justice system. *See, e.g., Powell* v. *Alabama*, 287 U.S. 45, 69 (1932) (a person charged with a crime "requires the guiding hand of counsel at every step in the proceedings against him"); *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938) (the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty"). In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), this Court held that the Sixth Amendment right to appointed counsel is applicable to state criminal proceedings through the Fourteenth Amendment. *See id.* at 342-345. As the Court there explained, it is "an obvious truth" that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

In subsequent cases, this Court set forth a commonsense approach to determining when a defendant's Sixth Amendment right to counsel attaches:

> Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

*Brewer*, 430 U.S. at 398 (quoting *Kirby*, 406 U.S. at 689).

In *Brewer*, this Court made clear that adversary judicial proceedings can commence, and a defendant's Sixth Amendment right to counsel attach, prior to indictment, at an initial appearance before a magistrate. In that case, the defendant turned himself in to the police after a warrant was issued for his arrest. The next day, he was "arraigned" before a judge

who advised him of his *Miranda* rights and committed him to jail. *Brewer*, 430 U.S. at 391.[1] After that initial appearance, the police elicited incriminating statements from Williams during a long automobile ride, although Williams had indicated that he did not want to speak to the police until he saw his attorney. *See id.* at 392. Those statements were introduced at trial, and the jury found Williams guilty of murder. *See id.* at 393-394.

This Court affirmed the federal habeas court's ruling that the incriminating statements should not have been introduced at trial and held that Williams had been deprived of his Sixth Amendment right to counsel. *See Brewer*, 430 U.S. at 397-398, 406. The Court explained:

> There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride. . . . A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge . . . , and he had been committed by the court to confinement in jail.

*Id.* at 399. *Brewer* thus holds that a defendant's arrest, appearance before a magistrate who informs him of the charges against him, and commitment to custody constitute

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[1] An "arraignment" can refer either to an initial appearance before a magistrate at which a defendant is notified of the accusation against him or to the step in criminal proceedings where, after information or indictment, a defendant must enter a plea. *See* LaFave et al., 1 *Criminal Procedure* § 1.3(k), at 113 n.176 (2d ed. 1999); *id.* § 1.3(o), at 124-125. Thus, an "initial appearance" or "first appearance" before a magistrate may be called in different jurisdictions a "preliminary arraignment," "an arraignment on the warrant," or "an arraignment on the complaint." *Id.* § 1.3(k), at 113. When a defendant, after information or indictment, is brought before a trial court and must enter a plea, the proceeding is often termed an "arraignment on information" or an "arraignment on indictment." *Id.* § 1.3(o), at 124-125. In *Brewer*, Williams had not been indicted and was not asked to enter a plea when he first appeared before the court. This Court noted that he was arraigned on a "warrant," 430 U.S. at 391, 399, indicating that the Court's use of the term "arraignment" in that case refers to the same type of initial court appearance that occurred in this case.

the initiation of adversary judicial proceedings that triggers the Sixth Amendment right to counsel.

This Court confirmed that holding in *Michigan* v. *Jackson*, which consolidated two cases from the Michigan Supreme Court. In both cases, the defendants were arrested, "arraigned" before a magistrate judge, and bound over to jail. *See* 475 U.S. at 627-628. As in *Brewer*, the arraignments in *Jackson* were not post-indictment arraignments at which a defendant enters a plea, but initial appearances before a magistrate, at which a defendant is informed of the accusation against him and his constitutional rights, including the right to counsel, and is committed to jail or released on bond.[2] This Court rejected as "untenable" the state's argument that such an arraignment did not trigger the Sixth Amendment right to counsel. *Id.* at 629 n.3. Rather, the Court confirmed the holding of *Brewer* that arrest, arraignment before a magistrate, and commitment to custody "signal[] 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment." *Id.* at 629. As the Court explained, it is at that time that "the government has committed itself to prosecute," and that the "defendant finds himself faced with the prosecutorial forces of organized society." *Id.* at 631 (quoting *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (quoting *Kirby*, 406 U.S. at 689)).[3]

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[2] *See* 1A Gillespie, *Michigan Criminal Law and Procedure* § 16:1 (2007) (explaining that "arraignment on the warrant [in Michigan] . . . is the first appearance by the defendant in the case" and provides "formal notice of the charge against the accused; the magistrate informs the accused of the right to counsel and inquiry is made to determine whether the defendant is in need of appointed counsel . . . and the arraigning judge may fix bail"); *see also Owen* v. *State*, 596 So. 2d 985, 988-989 (Fla. 1992) (explaining that when this Court stated in *Kirby* and *Jackson* that the Sixth Amendment right to counsel attaches at "arraignment," it was using the term in the "initial appearance" sense).

[3] *Jackson* also made clear that "[t]he question whether arraignment" or a functionally similar proceeding "signals the initiation of adversary judicial proceedings . . . is distinct from the question whether the ar-

2. *The Facts of This Case.*—On July 15, 2002, Walter Allen Rothgery was arrested without a warrant and booked into the Gillespie County, Texas jail on suspicion of being a felon in possession of a firearm. The arrest was made on the mistaken belief that Rothgery had been convicted of a felony in California.

The next day, Rothgery was brought before a magistrate judge. The arresting officer presented to the magistrate an "Affidavit of Probable Cause" sworn to by the officer, "in the name and by the authority of the State of Texas." App. 33a. The affidavit described the factual basis for the accusation against Rothgery and concluded, "I charge that ... Defendant Walter A. Rothgery did . . . commit the offense of unlawful possession of a firearm by a felon—3rd degree felony [Penal Code §] 46.04 against the peace and dignity of the State." *Id.*

Based on the arresting officer's affidavit, the magistrate judge signed an order finding that probable cause existed for Rothgery's arrest (meaning that probable cause existed to conclude he had committed the crime in question, *see Gerstein* v. *Pugh*, 420 U.S. 103, 111 (1975)). App. 34a. As required by the Texas Code of Criminal Procedure, the magistrate informed Rothgery of the accusation against him and informed him of his rights, including his right to appointed counsel. App. 35a-37a.[4]

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raignment itself is a critical stage requiring the presence of counsel." 475 U.S. at 629 n.3. As in *Jackson*, only the former question is presented here.

[4] Article 15.17 of the Texas Code of Criminal Procedure requires, consistent with this Court's holdings in *Gerstein*, 420 U.S. 103, and *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), that a person placed under arrest must be taken before a magistrate within forty-eight hours. The magistrate is required at that hearing to inform the arrested person of the accusation against him and his right to appointed counsel, and is authorized to set bail. Tex. Code Crim. Proc. arts. 14.06(a), 15.17(a). The Texas code also authorizes a magistrate to commit a defendant to jail. *Id.* arts. 16.20, 17.27(a). Texas magistrates often combine the Article 15.17 proceeding with the commitment proceedings. These combined proceedings are referred to as "magistration," a "magistrate hearing," "arraignment,"

Rothgery inquired about having counsel appointed, but was told that if he wanted to proceed with the hearing and have his bail set that morning, he would have to waive his right to an attorney for purposes of the hearing. Otherwise, Rothgery would have to wait in jail until an attorney was appointed, and only then would the court set bail. Rothgery agreed to waive his right to counsel for the limited purpose of allowing the hearing to continue and permitting the magistrate to set bail. The magistrate recorded Rothgery's temporary waiver, underlining the words "at this time" on the relevant form to document that he was waiving only his right to have counsel present at the hearing. App. 36a.

The magistrate set bail at $5,000 and committed Rothgery to jail pending the posting of bail or the disposition of charges against him. Rothgery posted a surety bond and was released from the county jail. The surety bond, signed by a Gillespie County deputy sheriff, stated that Rothgery "stands charged by complaint duly filed in the Justice of Peace Court" with the felony charge of unlawful possession of a firearm by a felon, and conditioned his release on his personal appearance in court on the charge. App. 39a.

After Rothgery's release on bond, he repeatedly inquired about the status of his request for appointment of counsel. In July 2002, he submitted a written, notarized request to Gillespie County jail officials for appointment of counsel. No counsel was appointed.

On January 17, 2003, a grand jury indicted Rothgery for the offense of unlawful possession of a firearm by a felon. Rothgery's bail was increased to $15,000. He was rearrested due to the bail increase and again brought before the magistrate, where he renewed his request for counsel. Again, no counsel was appointed, and, unable to post bail, Rothgery was committed to the Gillespie County Jail. Three days later, still with no lawyer, he was transferred to the Coman-

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"preliminary hearing," "initial appearance," or, in Texas, imprecisely as an "Article 15.17 hearing."

che County Jail, where he again completed a written request for counsel.

On January 23, 2003, a lawyer finally was appointed to represent Rothgery. The attorney secured an order reducing Rothgery's bail, allowing his release from jail after he had served approximately three weeks due to his second arrest. The attorney also obtained records establishing that Rothgery had not, in fact, been convicted of a felony. Accordingly, the district attorney moved to dismiss the indictment, and the court duly dismissed the charge.

3. *Proceedings Below.*—Rothgery sued Gillespie County under 42 U.S.C. § 1983 on the ground that the County had violated his Sixth Amendment right to counsel, alleging that the County followed a policy of not appointing counsel for indigent defendants released on bond until after indictment or information. Rothgery argued that *Brewer* and *Jackson* established that his Sixth Amendment right to counsel was triggered when he was arrested, brought before the magistrate and informed of the accusation against him, and committed to jail pending posting of bond or disposition of the accusation. Had counsel been appointed after his first appearance before the magistrate, Rothgery contended, the mistake underlying his arrest would have been discovered and he would not have been subject to bond for a lengthy period and wrongfully jailed in January 2003.

The district court granted Gillespie County's motion for summary judgment, holding that Rothgery's Sixth Amendment right to counsel did not attach at his initial appearance before the magistrate. App. 29a-31a. The Fifth Circuit affirmed. App. 2a, 12a. In reaching that determination, the Fifth Circuit recognized that this Court has held that adversary judicial proceedings can be initiated prior to indictment. App. 7a. Nevertheless—relying on *Kirby*'s statement that the right to counsel attaches when "the government has committed itself to prosecute," and the "defendant finds himself faced with the prosecutorial forces of organized society," 406 U.S. at 689—the court held that Rothgery's initial appearance did not trigger his right to counsel because he

had not demonstrated "prosecutorial knowledge of or involvement in [his] arrest and magistrate appearance." App. 12a.[5]

The Fifth Circuit acknowledged that, in *Brewer* and *Jackson*, this Court had held that an initial appearance before a magistrate, who informed the defendant of the charges against him and committed him to confinement, triggered the right to counsel, "without mentioning whether prosecutors were involved." App. 7a. However, it distinguished those cases on the ground that "the state supreme court opinion preceding *Jackson* establishes that the prosecutor's office approved and issued the complaints and warrants that led to the arraignment"—although this Court's opinion in *Jackson* never mentions that fact—and that "while the extent of prosecutorial involvement in *Brewer* was unaddressed, it does not appear that the state . . . raised the issue." App. 7a-8a. Finding no evidence that a prosecutor knew of or was involved in the sequence of events that led to Rothgery's court-imposed loss of liberty, the Fifth Circuit held that Rothgery had no right to counsel prior to his indictment. App. 12a.[6]

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[5] Gillespie County had argued that adversary judicial proceedings did not commence at Rothgery's initial appearance because the affidavit presented to the magistrate was not a "complaint" that formally charged a felony under Texas law. The Fifth Circuit chose not to resolve that issue of state law, noting that "we do not rely formalistically on the label given to a particular pretrial event when determining the point at which adversary judicial proceedings have been initiated," App. 5a, and that although "[w]e look to state law to determine when adversarial proceedings against the accused have commenced," "the ultimate Sixth Amendment consequence[] of certain state procedures is a matter of *federal* law," App. 5a-6a n.6 (emphasis added) (citation omitted). Instead, the Fifth Circuit concluded that, regardless of the answer to "the formalistic question of whether the affidavit here would be considered a 'complaint' or its functional equivalent under Texas . . . law," App. 11a, as a matter of federal law, an initial appearance before a magistrate and commitment to jail could not initiate adversary judicial proceedings unless a prosecutor was aware of or involved in the proceedings. App. 1a-2a, 5a-8a, 12a.

[6] In so holding, the Fifth Circuit relied in part on its own pre-*Jackson* decision in *McGee* v. *Estelle*, 625 F.2d 1206, 1208 (5th Cir. 1980)

## REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision conflicts with the decisions of other federal courts of appeals to consider the issue; splits with the decisions of state courts of last resort that have expressly rejected any such "prosecutorial involvement" test under the Sixth Amendment; and, ultimately, cannot be reconciled with this Court's precedent. Its decision permits defendants in that circuit who cannot demonstrate a prosecutor's involvement in their arrest or first court appearance to be jailed for substantial periods with no access to counsel. Moreover, the Fifth Circuit's reasoning makes clear that the disagreement over this important issue will persist absent this Court's intervention. This Court should grant certiorari.

### I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER FEDERAL COURTS OF APPEALS AND STATE COURTS OF LAST RESORT

#### A. The Fifth Circuit's Decision Conflicts With The Decisions Of Other Federal Courts Of Appeals

The Fifth Circuit's decision squarely conflicts with the holdings of three other federal courts of appeals, all of which have applied *Brewer* and *Jackson* to hold that the Sixth Amendment right to counsel is triggered by the same sequence of events that occurred in Rothgery's case: a defendant's arrest, his appearance before a magistrate who informs him of the charges against him, and his commitment to confinement. None of these courts has held that a prosecutor must be aware of or involved in these events in order for the Sixth Amendment right to attach.

In *Mitzel* v. *Tate*, 267 F.3d 524 (6th Cir. 2001), the Sixth Circuit considered facts indistinguishable from those in Rothgery's case and held that the defendant's right to coun-

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(holding that "an adversary criminal proceeding has not begun in a case where the prosecut[ors] are unaware of either the charges or the arrest"), App. 1a, 6a, concluding that nothing in *Brewer* or *Jackson* was "enough for us to ignore our binding authority," App. 8a.

sel had attached. There, Mitzel voluntarily came to the police station and made statements describing his role in the death of a friend. *See id.* at 527. The police arrested him without a warrant and brought him before a magistrate for his initial appearance, at which he was represented by counsel retained by his father. *See id.* at 528, 532 (citing Ohio R. Crim. P. 4(E)(2) (arrest without warrant)). After the initial appearance, the police elicited a further incriminating statement from the defendant without his counsel present. *See id.* at 528. Mitzel moved to suppress that statement, arguing that his Sixth Amendment right had attached at the initial appearance, barring the police from initiating interrogation in the absence of his lawyer. *See id.* at 531-532.

The Sixth Circuit observed that, by the time the statement in question was made, Mitzel "had been placed under arrest, the police had issued a complaint against him detailing the essential facts of the offense with which he was charged, and he had appeared before a state judge." 267 F.3d at 532. Furthermore, following this "initial appearance in front of the state judge, the court ordered that his confinement in jail continue." *Id.* Accordingly, the Sixth Circuit held that, as in *Brewer*, "'[t]here can be no doubt . . . that judicial proceedings had been initiated.'" *Id.* (quoting *Brewer*, 430 U.S. at 399) (bracket and ellipsis in *Mitzel*).

Like the Fifth Circuit, the Sixth Circuit acknowledged that the purpose of the Sixth Amendment "is to assure that in any criminal prosecution the accused shall not be left to his own devices in facing the prosecutorial forces of organized society." 267 F.3d at 532 (quoting *Moran* v. *Burbine*, 475 U.S. 412, 430 (1986) (quoting *Kirby*, 406 U.S. at 689)). In light of *Brewer*, however, the Sixth Circuit concluded that Mitzel was faced with "the prosecutorial forces of organized society," and that his right to counsel had thus attached, when he was arrested, was brought before a magistrate and informed of the charges against him, and was committed to confinement—the same events that occurred here. *Id.* at 532-533. That was so even though the *police*—not a prosecutor—had made the accusation against Mitzel that led to his

initial appearance, *see id.* at 532, and the court pointed to no evidence that prosecutors had been involved in the arrest or appearance before the magistrate.

Similarly, in *Matteo* v. *Superintendent, SCI Albion*, 171 F.3d 877 (3rd Cir. 1999), the en banc Third Circuit held that the defendant's right to counsel attached when he was arrested, brought before a judge for "preliminary arraignment," and committed to jail. *See id.* at 893. Like the Fifth and Sixth Circuits, the Third Circuit acknowledged that adversary proceedings begin when a defendant "'finds himself faced with the prosecutorial forces of organized society.'" *Id.* at 892 (quoting *Kirby*, 406 U.S. at 689). But, unlike the Fifth Circuit, the Third Circuit interpreted this language in a manner consistent with *Brewer* and *Jackson*, concluding that Matteo was "faced with the prosecutorial forces of organized society," and his Sixth Amendment right to counsel was triggered, upon his initial appearance before the magistrate and commitment to jail—well before the filing of an information by the district attorney and his arraignment on the information. *Id.* at 892-893. The Third Circuit made no mention of any prosecutorial involvement in Matteo's arrest or initial appearance, and made no suggestion that such involvement was relevant.

The Eleventh Circuit has likewise held that the Sixth Amendment right to counsel attaches after the same events that occurred in this case: arrest, an initial appearance before a magistrate, and commitment to custody. In *Fleming* v. *Kemp*, 837 F.2d 940 (11th Cir. 1988), the defendant, Fleming, was arrested and appeared before a justice of the peace who advised him of the charges against him and of his rights, and committed him to jail, setting no bond. *See id.* at 947. A few days later, the police initiated an interrogation of Fleming without counsel present and obtained statements that were admitted at trial. *See id.* In federal habeas proceedings, the warden argued that Fleming's Sixth Amendment rights had not attached when the statements were elicited, because his appearance before the justice of the peace was not a "formal arraignment, and thus falls outside of *Jack-*

*son*'s holding." *Id.* at 947-948. The Eleventh Circuit squarely rejected that argument, holding that, under *Jackson*, a "formal arraignment" is not required in order for adversary judicial proceedings to commence. *See id.* at 948. Rather, the court held that an initial appearance before a judicial officer at which a defendant is informed of the charges against him and committed to custody transforms the defendant from a "suspect" to an "accused" within the meaning of *Jackson* and triggers the defendant's right to counsel. *See id.* Again, the Eleventh Circuit did not discuss whether a prosecutor was involved in Fleming's initial appearance before the justice of the peace and nowhere intimated that a prosecutor's involvement is relevant to the analysis.

The Eleventh Circuit subsequently reaffirmed the rule adopted in *Fleming* in *Stokes* v. *Singletary*, 952 F.2d 1567, 1579 (11th Cir. 1992) (relying on *Brewer* and *Jackson* to hold that defendant's Sixth Amendment right to counsel had attached after arrest and an initial appearance before a magistrate).

### B. The Fifth Circuit's Decision Conflicts With The Decisions Of State Courts Of Last Resort

In addition, the Fifth Circuit's analysis conflicts with that of several state courts of last resort that have applied *Brewer* and *Jackson* to hold, as a matter of federal constitutional law, that the Sixth Amendment right to counsel had attached on facts functionally identical to those here. Indeed, two state supreme courts have expressly rejected a "prosecutorial involvement" test for the commencement of adversary judicial proceedings.

For instance, before this Court's decision in *Jackson*, the Georgia Supreme Court had adopted a rule that an initial appearance before a magistrate, at which no prosecutor was present, did not initiate adversary judicial proceedings. *See Ross* v. *State*, 326 S.E.2d 194, 200 (Ga. 1985), *overruled by O'Kelley* v. *State*, 604 S.E.2d 509 (Ga. 2004). When later confronted with the same fact scenario, the Georgia court rec-

ognized that its rule could no longer stand in light of *Jackson*. In *O'Kelley* v. *State*, 604 S.E.2d 509 (Ga. 2004), the Georgia court held that under *Jackson*, a "formal legal proceeding" triggers the Sixth Amendment right to counsel, regardless of whether a prosecutor is involved in that proceeding. *See id.* at 511. The court expressly noted that no prosecutor was present at the appearance in *O'Kelley*, and its opinion nowhere indicated that a prosecutor had been involved in the arrest. *See id.* Nevertheless, the court held, the "Sixth Amendment right to counsel attaches at an initial appearance hearing." *Id.* at 512. In doing so, the court expressly overruled *Ross* and rejected prosecutorial involvement as the yardstick for determining whether judicial proceedings had been initiated. *See id.* at 511-512.

Similarly, in *State* v. *Jackson*, 380 N.W.2d 420 (Iowa 1986), the Supreme Court of Iowa held that a defendant's Sixth Amendment right to counsel attached after he was arrested, made an initial appearance before a court, and was committed to jail. *See id.* at 424. The Iowa court expressly rejected the state's contention that the defendant's right to counsel did not attach after the initial appearance because there was no "participation by a prosecuting attorney in the proceedings." *Id.* at 423. The court observed that the case was "indistinguishable in principle from *Brewer*," where this Court held that adversary judicial proceedings had been initiated even though "no participation by a prosecuting attorney was shown." *Id.* at 424.[7]

Moreover, numerous state courts have applied *Brewer* and *Jackson* to hold that adversary judicial proceedings

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[7] The Iowa Supreme Court did note that the participation of a prosecutor in the investigative stages of a criminal proceeding is "some evidence" of a commitment to prosecute, but, unlike the Fifth Circuit, held that such participation was "not determinative." *Id.* at 423. And the Iowa court clearly held that even where there was *no* evidence of prosecutorial awareness or participation, arrest, magistration, and commitment to custody—the same events that occurred here—constituted the commencement of adversary judicial proceedings and triggered the Sixth Amendment right to counsel. *See id.* at 424.

commence when a defendant is accused of a felony offense, appears before a judge, and is bound over to jail or released on conditions of bail. For example, in *State* v. *Tucker*, 645 A.2d 111 (N.J. 1994), the Supreme Court of New Jersey recognized that, under *Jackson*, the Sixth Amendment right to counsel attached at a "first court appearance," *id.* at 119, even though the opinion nowhere suggested that a prosecutor had been involved in any stage before the initial appearance and "the State was almost always unrepresented at initial appearances in municipal court," *id.* at 123; *see also, e.g.*, *Bradford* v. *State*, 927 S.W.2d 329, 333-334 (Ark. 1996) (holding that *Jackson* compels the conclusion that adversary judicial proceedings have been initiated after a defendant is arrested, brought before a magistrate who determines probable cause for the detention, and bound over to custody); *Owen* v. *State*, 596 So. 2d 985, 988-989 (Fla. 1992) (relying on this Court's precedent to hold that adversary judicial proceedings "clearly have begun when an accused is placed in custody, haled before a magistrate on a warrant or formal complaint, and then tentatively charged with a particular crime at this initial appearance or 'arraignment'"); *State* v. *Barrow*, 359 S.E.2d 844, 848 (W. Va. 1987) (relying on *Jackson* to hold that the Sixth Amendment right to counsel attached when the defendant was arrested and made an initial appearance before a magistrate who committed him to custody).

By contrast, a minority of state supreme courts have held, on facts similar to those of this case, that the Sixth Amendment right to counsel was not triggered. For instance, in *Ex parte Stewart*, 853 So. 2d 901 (Ala. 2002), the defendant was arrested and made an initial appearance before a court which informed him of the charges against him, informed him of his right to counsel and other rights, and set bail. *See id.* at 902, 904. In a 5-3 decision, the Supreme Court of Alabama held that because this proceeding was merely "an informational proceeding designed to protect the rights of the accused," and not an "adversarial proceeding," the Sixth Amendment right to counsel had not attached. *Id.* at 904-905. The three justices in dissent recognized that the

majority's conclusion diverged from authority in other jurisdictions. Relying on the Eleventh Circuit's decision in *Stokes*, 952 F.2d 1567, and on the Florida Supreme Court's decision in *Owen*, 596 So. 2d 985, they concluded that because the judicial officer could set bail and commit the defendant to custody at the initial appearance, the defendant was certainly "confronted by the 'procedural system,'" and his Sixth Amendment right had attached. *Stewart*, 853 So. 2d at 909 (Lyons, J., dissenting) (citation omitted).[8]

* * * * *

In sum, under the analysis employed by the Third, Sixth, and Eleventh Circuits—as well as numerous state courts of last resort—Rothgery's Sixth Amendment rights would have been deemed to attach following his initial appearance before the magistrate, at which he was informed of the charges against him and committed to confinement. None of the other courts of appeals has employed the Fifth Circuit's "prosecutorial involvement" test or, indeed, hinted that a prosecutor's involvement is relevant. And two state supreme courts have expressly rejected the notion that a prosecutor's involvement could be dispositive. Moreover, the Fifth Circuit's express adherence to its own prior precedent employing the prosecutorial involvement analysis, even in light of this Court's subsequent decision in *Jackson*, *see supra* n.6, makes clear that this division of authority will not be resolved absent this Court's intervention.

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[8] Similarly, in *People* v. *Anderson*, 842 P.2d 621 (Colo. 1992), the Supreme Court of Colorado held that an initial appearance before a county judge under a Colorado rule that required the judge to advise the defendant of the charges against him, his right to counsel, and the amount of bail did not initiate adversary judicial proceedings and did not trigger the defendant's Sixth Amendment right to counsel, because "at that time the People had not elected to prosecute the defendant." *Id.* at 623.

## II. THE FIFTH CIRCUIT'S ANALYSIS CANNOT BE RECONCILED WITH THIS COURT'S SIXTH AMENDMENT PRECEDENT

The Fifth Circuit's analysis cannot be reconciled with this Court's decisions in *Brewer* and *Jackson*. In both of those cases, the Court held that a defendant's arrest, initial appearance before a judge who informed him of the charges against him, and commitment to confinement—the very events that occurred in Rothgery's case—marked the commencement of adversary judicial proceedings and triggered the defendant's Sixth Amendment right to counsel. *See Brewer*, 430 U.S. at 399; *Jackson*, 475 U.S. at 629.[9] In neither case did the Court consider it relevant whether a prosecutor was involved in, or aware of, the proceedings.

Rather, *Brewer* squarely held, without reference to prosecutorial involvement, that "[t]here can be no doubt . . . that judicial proceedings had been initiated" after the defendant had been arrested, "had been arraigned on [the arrest] warrant before a judge," and "had been committed by the court to confinement in jail." 430 U.S. at 399. The Fifth Circuit attempted to distinguish *Brewer* by stating that "it does not appear that the state contested that adversary judicial proceedings had begun." App. 8a. But this Court did not rest its decision on a concession by the state; rather, it explicitly held that adversary judicial proceedings had in fact commenced and the Sixth Amendment right to counsel had in fact attached—even though there was no indication in *Brewer* that any prosecutor was involved in the proceedings. *Id.*; *see also Jackson*, 380 N.W.2d at 424 (Iowa Supreme Court recognized that *Brewer* held that adversary judicial proceedings had been initiated even though "no participation by a prosecuting attorney was shown").

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[9] *See also Owen*, 596 So. 2d at 988-989 ("[T]he federal [Supreme] Court and commentators are in agreement that [adversary judicial] proceedings clearly have begun when an accused is placed in custody, haled before a magistrate on a warrant or formal complaint, and then tentatively charged with a particular crime at this initial appearance or 'arraignment.'").

In *Jackson*, this Court again held that it was clear that adversary judicial proceedings had been initiated after the two defendants in that case were arrested and had made initial appearances before a judge. *See* 475 U.S. at 629 & n.3. Like *Brewer*, *Jackson* nowhere suggested that a prosecutor was aware of or involved with the arrests or initial appearances, or that such awareness carried any weight in the Court's determination that adversary judicial proceedings had commenced. While the Fifth Circuit opined that the "[Michigan] supreme court opinion preceding *Jackson* establishes that the prosecutor's office approved and issued the complaints and warrants that led to the arraignment," App. 7a-8a (citing *People* v. *Bladel*, 365 N.W.2d 56, 71-72 (Mich. 1984)), this Court never even mentioned—let alone relied on—this fact in reaching its holding that the defendants' Sixth Amendment rights attached at their initial appearances.[10]

To support its "prosecutorial involvement" test, the Fifth Circuit seized upon this Court's statement in *Kirby* that adversary judicial proceedings commence when "'the government has committed itself to prosecute'" and "'a defendant finds himself faced with the prosecutorial forces of organized society.'" App. 5a (quoting *Kirby*, 406 U.S. at 689). But, in light of this Court's subsequent holdings in *Brewer* and *Jackson*, it is clear that the Fifth Circuit misconstrued the import of that language.

This Court has never held that Sixth Amendment rights attach only upon the involvement of a prosecutor. Nor has it held that the "prosecutorial forces of organized society" are limited to prosecuting attorneys. *See United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (the Sixth Amendment right to

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[10] Indeed, the Michigan Supreme Court also did not rely in any way on any prosecutorial involvement in the issuance of the complaints or arrest warrants in *Jackson*, instead simply concluding that because the defendants in that case had been "arraigned" (*i.e.*, had made initial appearances before a magistrate, *see supra* n.1), their Sixth Amendment rights had attached. *See Bladel*, 365 N.W.2d at 62.

counsel applies when "the accused [is] confronted . . . by the procedural system, *or* by his expert adversary, or by both") (internal quotation marks and citation omitted) (emphasis added). And the Fifth Circuit offered no reason why the defendant's need "to rely on counsel as a 'medium' between him and the State," *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985), should arise only when a *prosecutor* has filed charges against him. That need is equally present where—as here—a police officer has proffered a sworn accusation against a defendant "in the name and by the authority of the State," App. 33a, a judge has found probable cause to believe the defendant committed that offense, and the judge has bound him over to jail. By holding that adversary judicial proceedings had commenced in *Brewer* and *Jackson*, this Court has made clear that, when those events occur, a defendant is in fact "faced with the prosecutorial forces of organized society," and his Sixth Amendment right to counsel therefore has attached. *Jackson*, 475 U.S. at 631 (quoting *Gouveia*, 467 U.S. at 189 (quoting *Kirby*, 406 U.S. at 689)).[11]

The Fifth Circuit also sought to distinguish *Brewer* and *Jackson* by observing that the defendants in those cases were "arraigned on an arrest warrant," whereas Rothgery was arrested without a warrant. App. 7a. The court reasoned that Rothgery's initial appearance before the magistrate thus served only to determine probable cause for his arrest, rather than to mark the commencement of adversary judicial proceedings. App. 11a-12a. This Court's decisions, however, support no such distinction between arrests with

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[11] Indeed, *Jackson* made clear that "the confrontation between the State and the individual" that is the concern underlying the Sixth Amendment is not a confrontation with prosecutors alone, and that the police and the courts are also state actors for Sixth Amendment purposes. *See* 475 U.S. at 634 ("Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).").

and without warrants. Indeed, one of the two defendants in *Jackson*—like Rothgery—was arrested *without* a warrant. *See Bladel*, 365 N.W.2d at 69 ("defendant [Jackson] was arrested for a felony without a warrant"). While the police obtained the prosecutor's approval for an arrest warrant just before Jackson's initial court appearance, that appearance served to validate his arrest, as well as to inform him of the charges against him and commit him to custody, *see id.* at 70-73—precisely what occurred at Rothgery's initial appearance.

In any event, the Fifth Circuit's proffered distinction makes little sense. In both *Brewer* and *Jackson*, the relevant facts were that the defendant had been arrested, a court had found probable cause to believe the defendant had committed an offense, and the court had bound the defendant over to jail. Those same events occurred here. It can make no constitutional difference whether the judicial determination of probable cause occurred *before* or *after* the defendant's arrest. In either case, once a court has made such a determination and the defendant has "been committed by the court to confinement," *Brewer*, 430 U.S. at 399, he has been transformed from a mere "suspect" to an "accused," *Jackson*, 475 U.S. at 632, and his Sixth Amendment rights have attached.[12]

Because the facts of this case are materially identical to those in *Brewer* and *Jackson*, the Fifth Circuit's holding that Rothgery had no right to counsel cannot be reconciled with this Court's precedent, and warrants this Court's review.

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[12] *See also, e.g., Mitzel*, 267 F.3d at 532 (Sixth Amendment right attached following a warrantless arrest, an initial appearance before a magistrate, and confinement to jail); *Bradford*, 927 S.W.2d at 333-334 (Sixth Amendment right was triggered by an initial appearance before a magistrate who simultaneously found probable cause for the defendant's detention by the police and committed her to custody).

## III. THE FIFTH CIRCUIT'S "PROSECUTORIAL INVOLVEMENT" TEST WILL BE UNWORKABLE IN PRACTICE AND WILL PERMIT INDIGENT DEFENDANTS TO BE JAILED FOR LONG PERIODS WITHOUT COUNSEL

Finally, the Fifth Circuit's decision merits review because of its undesirable, and potentially far-reaching, practical consequences.

As an initial matter, the Fifth Circuit's "prosecutorial involvement" test requires courts to engage in an unnecessarily fact-intensive, and ultimately unworkable, inquiry. While *Kirby*, *Brewer*, and *Jackson* establish a straightforward, easily applicable test for determining when the Sixth Amendment right to counsel attaches based on the nature of the *proceedings* that took place, the Fifth Circuit's approach requires courts to look beyond the objectively ascertainable procedural posture of a case to delve into precisely what prosecutors knew about the police's actions, when they knew it, and the extent of their involvement in pre-trial proceedings. Such an inquiry is likely to be both unnecessarily complicated and unduly intrusive.

For example, a defendant may file a motion to suppress statements made after what the defendant asserts is the commencement of adversary judicial proceedings. If communication between law enforcement officers and prosecutors is not memorialized in formal documents filed with the court, the court must receive testimony to determine who knew what when. A prosecutor's notes and testimony could become regular features of suppression hearings, and discovery battles could ensue. The courts will need to examine details such as whether a prosecutor helped a police officer with a complaint, or whether an officer left a message informing a prosecutor that an arrest warrant had been obtained or that an initial appearance had been scheduled. There is no justification for engrafting such a needlessly

complex inquiry onto what should be the straightforward determination of when a defendant is entitled to counsel.[13]

Moreover, and more fundamentally, under the Fifth Circuit's test, indigent defendants can be incarcerated for lengthy periods without counsel. A prosecutor may take six months (as in this case) or more before indicting a felony defendant. Under the Fifth Circuit's rule, an indigent defendant arrested without a prosecutor's involvement could be jailed throughout that period without access to any legal assistance.

The facts of this case make plain the threat that the Fifth Circuit's rule poses to the values underlying the Sixth Amendment. Here, had an attorney been appointed after Rothgery's initial appearance, when he requested counsel, the mistake underlying his arrest would have quickly been uncovered and the charges dismissed—as they eventually were more than six months later. Had Rothgery had the assistance of counsel during that time, his bail would not have been increased, he would not have been rearrested, and he would not have been wrongfully jailed.

As this Court has declared: The "noble ideal [where every individual stands equal before the law] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." *Gideon*, 372 U.S. at 344. Because the Fifth Circuit's approach leaves indigent defendants in that circuit without the assistance of counsel to contest substantial court-imposed deprivations of their liberty, the Court should review this case.

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[13] Moreover, it is unclear what degree of knowledge or involvement by prosecutors is required under the Fifth Circuit's test. The decision will lead to litigation over questions such as whether it is sufficient that a police officer informed a prosecutor that an individual had been arrested or whether a prosecutor must be involved in the pre-trial proceedings in some manner, and if so, the requisite extent and formality of such involvement.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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